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**PROMOTION OF DISTANCE EDUCATION
THROUGH DIGITAL TECHNOLOGIES**

REPLY COMMENTS

**AMERICAN ASSOCIATION OF LAW LIBRARIES
AMERICAN LIBRARY ASSOCIATION
ASSOCIATION OF RESEARCH LIBRARIES
MEDICAL LIBRARY ASSOCIATION
SPECIAL LIBRARIES ASSOCIATION**

MARCH 3, 1999

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Berne Convention Implementation Act, H.R. Rep. No. 609, 100 Cong., 2d Sess. 22 (1988).

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REPLY COMMENTS

The nation's five major library associations, on behalf of their more than 80,000 individual and institutional members nationwide (the "Library Associations"), appreciate this opportunity to submit the following comments in reply to testimony taken in the important docket referenced above. Specifically, the Library Associations hereby reaffirm for the record their written testimony presented in Washington on January 26, 1999 by Mr. James Neal and respectfully further submit that:

I. [Modernization of Title 17 U.S. Code 110\(2\) to Enable Digitally Networked Distance Education is Fully Consistent with the Constitutional Origins of Copyright Law and Past Congressional Response to Evolving Technology.](#)

II. [The Fair Use Doctrine Should Not be Viewed as an Adequate Substitute for Comprehensive and Balanced Modernization of Title 17 U.S.C. 110\(2\).](#)

III. [The Relative Ease and Cost of Licensing Electronic Materials is Fundamentally Irrelevant to the Policy Balance at the Core of Title 17 U.S.C. 110\(2\).](#)

IV. [Modernization of Title 17 U.S.C. 110\(2\) Can be Accomplished in a Manner Fully Consistent with the United States Obligations Under International Copyright Law.](#)

[\[Conclusion\]](#)

ARGUMENT

I. Modernization of Title 17 U.S. Code 110(2) to Enable Digitally Networked Distance Education is Fully Consistent with the Constitutional Origins of Copyright Law and Past Congressional Response to Evolving Technology.

In the House Judiciary Committee's 1988 report on legislation implementing the Berne Convention, Chairman Robert W. Kastenmeier wrote:

The framers of the Constitution assigned to Congress, the most politically representative of the three branches of the federal government, the role of establishing intellectual property laws in exchange for public access to creations. In this context, the founding fathers contemplated a political balancing of interests between the public interest and proprietary rights. Congress struck that balance when it established the first patent and copyright laws.

As this country has developed and as new technologies have burst upon the scene, Congress has adjusted this nation's intellectual property laws to incorporate new subject matter and to redefine the balance between public and proprietary interests. Today, we live in an age of rapid technological change, growing internationalization of various aspects of law, and increasing importance of intellectual property in world trade. The congressional role may be more complicated, but its objectives remain essentially unchanged. Congress must engage in the delicate assessment of equities between the public interest and proprietary rights.

Berne Convention Implementation Act, H.R. Rep. No. 609, 100 Cong., 2d Sess. 22 (1988) (emphasis supplied).

Congress struck precisely such a balance in 1976 when it recalibrated the nation's copyright laws by both codifying the rights of information proprietors and by delineating significant and clear limitations on those rights. Indeed, as made clear in the landmark Act's legislative history:

The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications or exemptions in the 12 sections that follow. Thus, everything in section 106 is made "subject to sections 107 through 118," and must be read in conjunction with those provisions.

Copyright Law Revision, H.R. Rep. No. 1476, 94 Cong., 2d Sess. 61 (1976).

Section 110(2), adopted by Congress in 1976 to facilitate certain uses of copyrighted material in "instructional television" without remuneration to the copyright owner for each such use, was a direct response to evolving educational technology and pedagogical practice. In dealing with a related subissue, the Committee Report provides an important window into Congress' original rationale of all of section 110(2):

There has been some question as to whether or not the language in this section of the bill is intended to include instructional television college credit courses. These courses are aimed at undergraduate and graduate students in earnest pursuit of higher educational degrees or unable to attend daytime classes because of daytime employment, distance from the campus, or some other intervening reason. *So long as these broadcasts are aimed at a regularly enrolled students and conducted by recognized higher educational institutions, the committee believes that they are clearly within the language of section 110(2)(C)(ii).* Like night school and correspondence courses before them, these telecourses are fast becoming a valuable adjunct of the normal college curriculum. *Id.* at 84 (emphasis supplied).

Thus, in crafting and adopting section 110(2), Congress expressly relied upon the good faith intent and public purpose of bona fide educators to use responsibly new technology to meet the needs of evolving categories of legitimate learners of all ages for the express purpose of overcoming the barrier to education often posed by distance.

Moreover, in so striking the balance between information proprietors and educational users in section 110(2), Congress expressly accepted the risk that the system it had devised would not be "leak-proof" with respect to the unauthorized receipt of copyrighted information. The Committee Report makes plain that, to qualify for the benefit of the new exemption:

... an "instructional transmission" need only be made "primarily" rather than "solely" to the specified recipients to be exempt. Thus, the transmission could still be exempt even though it is capable of reception by the public at large. *Id.* at 83.

The Library Associations concur that the digital environment legitimately may require educators to employ or enable certain technologies to limit the distribution of material pursuant to an updated section 110(2). Nonetheless, Congress' analysis more than 20 years ago makes plain that the availability of near perfect protection technologies was not a prerequisite to an effective exemption in 1976 and need not be made so in 1999.

II. The Fair Use Doctrine Should Not be Viewed as an Adequate Substitute for Comprehensive and Balanced Modernization of Title 17 U.S.C. 110(2).

As detailed above, Congress overtly constructed the nation's copyright laws as a whole comprised of halves: the "bundle" of proprietary rights codified in section 106, and the qualifications to and exemptions from those rights then delineated in sections 107 through 118. It also expressly recognized in codifying the long-standing judicial doctrine of fair use that "since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." *Id.* at 67. In sharp contrast, the defined and carefully calibrated exemptions separately

enacted were intended to permit "certain . . . practices which may not qualify as fair use." Id. at 74 (e.g., regarding section 108). Moreover, in contrast to the case-by-case defense afforded by fair use under section 107, Congress affirmatively encouraged valuable practices by means of outright exemptions from liability. Section 110(2), of course, is such an exemption.

The suggestion in oral and written testimony by many industry witnesses that clarification of the fair use doctrine could obviate the need to modernize section 110(2) in keeping with its original objectives thus ignores the significantly different nature and intent of section 107 and the express exemptions codified in title 17. Indeed, the Library Associations respectfully submit that it is difficult to understand how distance education as practiced in the 1990s might be "promoted" by fossilizing the scope of the section 110(2) exemption in favor of a potentially limited and uncertain defense to liability never intended by Congress or the courts to bear such weight.

Proprietary industry representatives further argue in opposition to revision of section 110(2) that a panel of educational institution witnesses in Washington acknowledged in dialogue with the Copyright Office staff that the needs of their institutions could be adequately met by a distance education regime based solely on current law, fair use and non-statutory guidelines (see Comments of Time-Warner at 4 and oral comments of Disney representative on January 26, 1999). Once apprised of this misinterpretation of their lay response to a legal question, however, all four members of the panel subsequently filed a joint supplemental statement for the record. It explains, in relevant part, that:

During the question and answer period of our panel before representatives from the U.S. Copyright Office in Washington, DC, Ms. Perlmutter asked, "Just to clarify, I think I heard from at least a couple of witnesses a view that the fair use provisions in the current copyright law combined with fair use guidelines could be sufficient to deal with the new issues raised by digital distance education." As non-lawyer practitioners, we understood this question to ask if we were in fact suggesting no significant changes to the major fair use provisions of the copyright code -- hence our answers in the affirmative. However, upon review of the written transcript it may appear to some that we do not support an appropriate digital distance education exemption to section 110(2) of the copyright code.

For the official record of the Copyright Office's proceedings and to clarify the possible misunderstanding of our answers to the above question, our institutions do support a broadening of the exemption in section 110(2) to include digital and new media applications. As the balance of our testimony demonstrated, this updating of the Copyright Code is appropriate and without reasonable risk.

See Letter of February 26, 1999 signed Ms. Kathleen Burke and Ms. Kim Kelley for the University of Maryland University College, Mr. Richard Fischer for the University of Delaware and Mr. Donald Swoboda for the University of Nebraska.

Moreover, if Congress were to force modern distance educators to rely on a fair use case-by-case defense to justify activities previously exempted from liability, it would shift a substantial burden of proof to educational institutions and educators. Rather than providing certainty as to what conduct educators might engage in as they prepare for coming lessons, as section 110(2) now does with antiquated delivery systems, a fair use-dependent regulatory regime would cast great doubt on such activities and produce the chilling effect of substantial contingent liability for all distance education endeavors. Rather than "promote" the viability of distance education in the next century, such a shift would severely retard it.

Finally, as noted in the comments of the Association of American Publishers, the Library Associations (together with 11 other major national organizations) opposed the premature adoption of fair use "guidelines" considered by the non-Congressional Conference on Fair Use. They did so primarily because the proposed guidelines were regarded by some not as "safe harbors," but as the

likely outer limits of fair use. Rejection of narrow guidelines as an alternative to statutory exceptions is entirely consistent with Congress' view in 1976 of the then new fair use section of the Copyright Act:

The bill endorses the purpose and general scope of the doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. H.R. Rep. No. 1476 at 66.

Such caution with regard to a case-by-case defense to liability was and remains entirely appropriate, just as modernization of an outdated exemption is entirely appropriate, if the certainty such separate exemptions were deliberately designed for is to be maintained.

III. The Relative Ease and Cost of Licensing Electronic Materials is Fundamentally Irrelevant to the Policy Balance at the Core of Title 17 U.S.C. 110(2).

Industry witnesses have uniformly argued before the Copyright Office in this proceeding that the section 110(2) exemption "ain't broke" and accordingly requires no "fixing." In support of this claim, they allege that it is now easy -- and will be increasingly so over time -- for educational institutions and distance educators to quickly and inexpensively license the materials they wish to incorporate into digitally networked distance education lessons. Three responses are required.

First, proponents of the "ain't broke" theory strategically -- but incorrectly -- presume that whether to update the current Copyright Act to facilitate modern distance learning activities is an open policy question within the scope of the Copyright Office's charge in this proceeding; it is not. The instant docket was not opened in a vacuum. Rather, the 105th Congress concluded that changes to current law are necessary and should be undertaken expeditiously after Copyright Office recommendations as to how to "promote distance learning through digital technologies" are received. As detailed in the Senate Judiciary Committee's Report on the Digital Millennium Copyright Act:

The Committee underscores the importance to the public of a speedy resolution of any copyright issues associated with distance learning and commits itself to developing a fair and effective distance learning regime promptly after receipt of the Register's Report.

The Digital Millennium Copyright Act Of 1998, S. Rep. No. 190, 105 Cong., 2d Sess. 23 (1998) (emphasis supplied). Senator Leahy, in his supplemental views, provides important additional context:

We made tremendous strides in the Committee to chart the appropriate course for updating the Copyright Act to permit the use of copyrighted works in valid distance learning activities. Senator Hatch, Senator Ashcroft, and I joined together to ask the Copyright Office to facilitate discussions among interested library and educational groups and content providers with a view toward making recommendations that could be incorporated into the DMCA at the April 30 markup. Based on the Copyright Office's recommendations, we incorporated into the DMCA a new section 122 requiring the Copyright Office to make broader recommendations to Congress on digital distance education within six months. Upon receiving the Copyright Office's recommendations, it is my hope that the Senate Judiciary Committee will promptly commence hearings on the issue and move expeditiously to enact further legislation on the matter. *I know that all members on this Committee are as anxious as I am to complete the process that we started in Committee of updating the Copyright Act to permit the appropriate use of copyrighted works in valid distance learning activities. This step should be viewed as a beginning--not an end, and we are committed to reaching that end point as quickly as possible* Id. at 68 (emphasis supplied).

The Library Associations respectfully submit that, in light of the substantial expansion of their rights

codified in the Digital Millennium Copyright Act and last year's related Judiciary Committee-sponsored negotiations on modernizing section 110(2), there is no basis for information proprietors' suggestion in this proceeding that such change should now be deferred indefinitely. It is the appropriate form of changes to title 17, section 110(2), not whether such changes are needed, that is the real issue in this proceeding.

Second, the ease and cost of licensing is irrelevant to the question of how best to update the policy balance at the core of section 110(2). Nowhere in the legislative history of section 110(2) (or of the general revision of the Copyright Act in 1976) does Congress state or imply that the many exemptions from copyright liability established therein owed their existence to the difficulties that otherwise would have been faced by the exemptions' beneficiaries. Similarly, to the best of the Library Associations' knowledge, nowhere in the record of this proceeding has information been presented which would justify changing the policy basis of the section 110(2) exemption. For decades, Congress' desire to enable educators to use certain copyrighted material and distance-defeating technology to enhance the educational endeavor has served the nation well as the basis of this critical exemption. As technology and pedagogy have dramatically progressed, no case has been made as to why that rationale should be abandoned.

Third, even if the logistics and cost of licensing copyrighted materials is factored into the policy equation, the record of this proceeding makes clear that all too often the reality for educators and librarians is that licensing is neither readily available nor economical. Specifically:

- Utah Educational Network states: "Much content that could potentially have great impact in the classroom does not get employed because of the difficulties associated with licensing and/or receiving permission" (see UEN Comments at 3);
- Dr. Edward F. Brooks, Associate Provost of the University of North Carolina at Chapel Hill elaborated on this point, stating that: "Some publishers are unwilling to provide electronic access under any circumstances, or limit access to use in a building; while others charge prohibitively high access fees" (see UNC Comments at 6);
- With regard to fees, the University of Maryland University College librarian told the Register that she was quoted a rate of \$3,000 to use a single newspaper article in a distance learning environment. The written comments of UMUC also catalog other licensing-related problems that the institution has encountered, including: the denial of licenses, quotation of excessive fees, and the significant costs to the institution of the time needed to seek permissions (see UMUC Response to the Register's supplemental questions at 4-5);
- Concerning access, Sharon Hogan, University Librarian for the University of Illinois at Chicago, testified on February 12, 1999 that, even when a license is conveniently available, it is often presented by the holder of the copyright encumbered by conditions which would destroy the utility of the material in the distance education environment. A proposed restrictive clause anachronistically limiting the use of electronic material to within the library's own walls was just one such contract term that she cited by Ms. Hogan (see Hogan Comments at 2);
- The University of Montana also has encountered contract terms affirmatively hostile to distance education: "[U]niversities as licensees of technology and information linked to distance learning have faced contracts penalizing distance education remote site students. The University has also experienced serious difficulties in persuading certain licensors to accept distance education students accessing the licensed material as part of the University's overall student population for access purposes"(see UM Comments at 18);
- The bottom line, according to the Indiana Commission for Higher Education, is: "Most importantly, in many cases licensing is simply not an alternative." The Commission cites four principal deficiencies in the licensing arena:

- the failure of licensors to make material available in a desired format or for distance education use;
 - the institution's inability to identify the copyright owner, even after a diligent search;
 - the unavailability of a desired work in the marketplace; and
 - the granting of licenses, when available, well past the time when the material for which permission is sought would be pedagogically useful. (see ICHE Comments at 2);
- Nor are problems associated with fees, logistics and apparent fear of distance education uses limited to isolated institutions. The American Association of Community Colleges, representing hundreds of institutions nationwide, wrote that: "...obtaining a license often can be very difficult. There is little consistency among copyright owners in the manner in which they want to be approached about licenses or their willingness to negotiate a license, and many colleges and universities providing instruction in technical and scientific areas have found that some materials are so obscure that it can be extremely difficult and time consuming to locate the copyright owner or to even know where to ask to obtain a license. . . . It can be difficult and, sometimes, almost impossible to determine ownership of a copyright. . . ." (see AACC Comments at 5).

The Library Associations also wish to underscore that the record of this proceeding contains important testimony concerning the tremendous potential *social and intellectual* cost of over-reliance on the marketplace to assure that copyrighted material is adequately available to the next generation of American learners of all ages. Testifying in Los Angeles, Dr. Albert Carnesale, Chancellor of the University of California at Los Angeles, crucially emphasized that:

[A]cademic freedom cannot survive in an environment in which teachers and students are fully dependent on the choices made by an outside party regarding what material they may use in class. This becomes evident if one considers out-of-print books in education. Today, class material may include out-of-print books borrowed from the library. Some of these may expound controversial or unpopular but historically important views. In choosing to let the book go out of print, a publisher does not take it out of circulation. *If instructional performance and display depends solely on licensing, a copyright holder will have the power to prevent critical examination of any material that he or she does not choose to license.* (see UCLA Comments at 4-5, supplied emphasis).

Mindful that section 106 rights are exclusive monopoly rights under the Copyright Act, the Library Associations are also unaware of any evidence presented in this proceeding which would justify reversal of the time-tested economic principle that monopoly market status does not tend to minimize the price of a product or to maximize the liberality of the terms under which it may be used. Indeed, the record contains ample evidence that time-tested theories of monopoly behavior remain accurate.

IV. Modernization of Title 17 U.S.C. 110(2) Can be Accomplished in a Manner Fully Consistent with United States Obligations Under International Copyright Law.

Commenting parties in this proceeding have suggested that the modernization of section 110(2) to permit material of all relevant kinds to be carried over digital networks (and to permit bona fide students to access such material from outside the traditional classroom with appropriate safeguards against further distribution) could violate various international copyright agreements to which the United States is a party, including the WIPO Copyright Treaty recently concluded. The argument appears to be premised on the assertion that educators and librarians seek a "blanket" (or effectively limitless) exemption which would cause "undue" harm to the market for licensable products. This claim is flawed in at least two significant respects.

First, the Library Associations - together with their many colleagues in the library and educational professions - are committed to crafting an updated section 110(2) which effectively protects the

emerging market for prepackaged electronic distance education and other course material. Libraries nationwide already purchase well over \$2 billion in such materials annually and see nothing in the future which will undermine this robust market. The Library Associations do not now seek, and have never proposed, any revision of section 110(2) which would, for example, permit an institution to buy one copy of a textbook and make it available for printing in its entirety by the entire enrolled population of a university or even of a single course. Such exaggerated claims do a disservice to the debate and should not be credited in any reasoned analysis of section 110(2)'s future.

Second, there is no inherent inconsistency between updating section 110(2) and the United States' treaty obligations under either the Berne Convention or the WIPO Copyright Treaty. Indeed, this most recent agreement expressly contains language in Article 10 successfully fought for by the United States delegation which provides that:

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

The definition of key words in this clause, such as "normal," "unreasonably," and "legitimate" are all fair subjects of the policy debate yet to come. No evidence has been provided in the record of this proceeding documenting their settled meaning or how such meanings might relate to the distance education enterprise in the public and private sectors. What is clear is that the treaty obviously contemplates that proprietary rights elsewhere protected under the treaty need not be absolute. The Preamble of the treaty itself further underscores the point in noting expressly that the entire document is to be read:

Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.

CONCLUSION

In sum, in formulating its report to Congress, the undersigned Library Associations respectfully urge the Copyright Office to:

- Acknowledge that modernization of title 17, section 110(2) of the Copyright Act is fully consistent with the origins of the nation's copyright laws, America's international obligations, Congress' intention in enacting section 110(2), and the overall policy balance struck in adoption of the Digital Millennium Copyright Act;
- Recognize that neither the doctrine of fair use, nor such licensing practices and technologies as may evolve, are an appropriate substitute for modernization of section 110(2);
- Premise its recommendations on the conclusion that both Congress and the times require recommendations as to how best to modernize title 17, section 110(2) to promote distance education through the use of digital technologies, not *whether* to do so; and

- Propose changes to section 110(2) of the present Copyright Act which - consistent with the section's origins - will permit educators to take full advantage of digital network technology to afford students of all ages, regardless of their physical location, appropriate access and use of copyrighted materials germane to their courses of instruction.

Respectfully submitted,

Carol C. Henderson
Executive Director
American Library Association -
Washington Office *for*

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